



GHENT
UNIVERSITY



FACULTY OF
LAW AND CRIMINOLOGY



EU FORUM OF JUDGES FOR THE ENVIRONMENT
UE FORUM DES JUGES POUR L'ENVIRONNEMENT

The Aarhus Convention

Prof. Dr. Luc Lavrysen
Ghent University
Constitutional Court of
Belgium

Part 1: General Introduction

- UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters**

- Adopted on 25th June 1998 in the Danish city of Aarhus
 - Fourth Ministerial Conference in the 'Environment for Europe' process

- Entered into force on **30 October 2001**

- 47 Parties**

- Kazakhstan: Ratification - 11 January 2001

- PRTR Protocol (Kiev): 36 Parties – 8 October 2009 – Kazakhstan: not ratified*

- GMO Amendment (Almaty) : 31 Parties – 27 May 2005 - Kazakhstan: not ratified*

- Principle 1 of the Stockholm Declaration on the Human Environment (1972)

- Principle 10 of the Rio Declaration on Environment and Development (1992)

- Article 1 Objective**

In order to **contribute** to the **protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being**, each Party shall guarantee the **rights of access to information, public participation in decision-making, and access to justice in environmental matters** in accordance with the provisions of this Convention

- 3 Procedural Rights that contribute to the realization of a Substantive Right

- 3 « Pillars »

- Access to Environmental Information

- On Demand (Art. 4) - Passive
 - Collection and dissemination of environmental information (Art. 5) - Active

- Public Participation

- In decisions on specific activities (Art. 6)
 - Concerning plans, programmes and policies relating to the environment (Art.7)
 - During the preparation of executive regulations and/or generally applicable legally binding normative instruments (Art. 8)

- Access to Justice

- Concerning Access to Environmental Information (Art. 9(1))
 - Concerning Public Participation (Art. 9 (2))
 - Concerning Acts and Omissions violating Environmental Law (Art. 9(3))
 - Minimum-requirements (Art. 9 (4))
 - Assistance mechanisms (Art. 9 (5))

- Convention Bodies**

- Meeting of the parties** (every 3 y)

- Main governing body
 - All Parties to the Convention
 - Observers:
 - other Signatories and other States
 - intergovernmental and non-governmental organisations
 - Second Meeting of the Parties, May 2005, Almaty

- Working Group of the Parties** (every y)

- Same composition
 - Oversee the implementation of work programme and prepare the meetings of the Parties

- Bureau**

- Compliance Committee**

- 9 Independent legal experts
 - Review of Compliance by the Parties of their Obligations under the Convention
 - (1) Submission by a Party about compliance by another Party – **2**
 - (2) Submission by a Party concerning its own compliance - **1**

(3) Referral of the Secretariat – **None**

(4) Communications of Members of the public concerning a Party's compliance with the convention –
158

- ACCC/C/2004/01 Kazakhstan – Access to Information (Art. 4 (1) and (2)) and Access to Justice (Art. 9(1))
- ACCC/C/2004/2 Kazakhstan – Public Participation (Art.6 (1)(a)(2) (3) (4) (7) (8)
- ACCC/C/2004/6 Kazakhstan – Access to Justice (Art. 9 (3) and(4))
- ACCC/C/2011/59 Kazakhstan – Public Participation (Art. 6 (2),(6), (7) and (9))
- ACCC/C/2013/88 Kazakhstan – Public Participation (Art. 6 (2) (3) (8) – Art. 7)

- **Task Force on Access to Justice**

- Platform for sharing of information, experiences and good practices
- Capacity-building activities and information exchange
- Training materials, etc..

- **Task Force on Public Participation in Decision-making**

- **Task Force on Access to Information**

- **Aarhus Centres – OSCE**

- Provide members of the public with practical resources to exercise their environmental rights under the Aarhus Convention
- Kazakhstan: 14 <https://aarhus.osce.org/kazakhstan>

- **Guidance Material**

- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
- The Aarhus Convention: An Implementation Guide (second edition)
- Case Law of the Aarhus Convention Compliance Committee (2004-2011)

Also available in Russian

- **AARHUS CLEARINGHOUSE for Environmental Democracy**

- <https://aarhusclearinghouse.unece.org/>

Part 2.

Introduction to the provisions of the Convention

- Access to Environmental Information

- On Demand (Art. 4)

- Broad definition (Art. 2 (3))

"Environmental information" means any information **in written, visual, aural, electronic or any other material form** on:

(a) **the state of elements of the environment**, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) **factors**, such as substances, energy, noise and radiation, and **activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment** within the scope of subparagraph(a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) **the state of human health and safety, conditions of human life, cultural sites and built structures**, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;"

- o **Public authorities** - in response to a request – make information available - to the **public**

Public authorities =

- (a) government at national, regional and other level;
- (b) natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- (c) any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

- (d) the institutions of any regional economic integration organisation [...] which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

Public =

"one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups"

(a) **without an interest having to be stated;**

(b) in **the form requested unless:**

(i) it is *reasonable* for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) the information is *already publicly available* in another form.

- Information shall be made available **as soon as possible** and at the latest within **one month**, unless the volume and the complexity of the information justify an extension of this period up to two months after the *request*

- Applicant shall be *informed* of any extension and of the reasons justifying it

(1) Formal refusal grounds: A request for environmental information **may be refused** if:

(a) the public authority to which the request is addressed **does not hold the environmental information** requested;

(b) the request is **manifestly unreasonable** or formulated in **too general a manner**; or

(c) the request concerns **material in the course of completion** or concerns **internal communications** of public authorities where such an exemption is provided for in national law or customary practice, **taking into account the public interest served by disclosure.**

(2) Substantive refusal grounds: A request for environmental information **may be refused if the disclosure would adversely affect:**

- (a) the **confidentiality of the proceedings of public authorities**, where such confidentiality is provided for under national law;
- (b) **international relations, national defence or public security**;
- (c) the **course of justice**, the ability of a person to receive a **fair trial** or the ability of a public authority to conduct an **enquiry of a criminal or disciplinary nature**;
- (d) **the confidentiality of commercial and industrial information**, where such confidentiality **is protected by law in order to protect a legitimate economic interest**. *Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;*

(e) **intellectual property rights**;

(f) the **confidentiality of personal data and/or files** relating to a **natural person** where that person **has not consented to the disclosure of the information to the public**, where such confidentiality is provided for in national law;

(g) the **interests of a third party** which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) **the environment** to which the information relates, such as the *breeding sites of rare species*.

- The grounds for refusal shall be interpreted in **a restrictive way**, taking into account **the public interest served by disclosure** and taking into account whether the information requested **relates to emissions into the environment**
- Where a public authority **does not hold the environmental information requested**, this public authority shall, as promptly as possible, **inform the applicant** of the public authority to which it believes it is possible to apply for the information requested or **transfer the request** to that authority and inform the applicant accordingly
- If information exempted from disclosure can be **separated** out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested

- A **refusal** of a request shall be **in writing** if the request was in writing or the applicant so requests. A refusal shall **state the reasons** for the refusal and give **information on access to the review procedure**. The refusal shall be made **as soon as possible** and at the latest within **one month**, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.
- Public authorities **may** make **a charge** for supplying information, but such charge shall not exceed a **reasonable amount**
- **Collection and dissemination of environmental information (Art. 5)**

Public participation

Public participation in decisions on specific activities (Art. 6) - Each Party:

(a) **shall apply** the provisions of this article with respect to decisions on whether **to permit proposed activities listed in Annex I**;

(b) **shall**, in accordance with its national law, **also apply the provisions of this article to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment**. *To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and*

(c) **may decide**, on a case-by-case basis if so provided under national law, **not to apply** the provisions of this article to proposed **activities serving national defence purposes**, if that Party deems that such application would have an adverse effect on these purposes.

- **Annex I - 20 Categories of activities with sub-divisions:** Energy sector; Production and processing of metals; Mineral industry; Chemical industry; Waste management; Waste-water treatment ; Pulp- en Paper production; Construction of line-infrastructure; Waterways; Groundwater abstraction or artificial groundwater recharge ; Transfer of water resources between river basins; Extraction of petroleum and natural gas; Pipelines for the transport of gas, oil or chemicals; Intensive rearing of poultry or pigs; Quarries and opencast mining; Electrical power lines; Storage of petroleum, petrochemical, or chemical products; Other activities

- o The public concerned shall be **informed**, either by public notice or individually as appropriate, **early in an environmental decision-making procedure**, and in an **adequate, timely and effective manner**, inter alia, of:

(a) the proposed activity and the application on which a decision will be taken;

(b) the nature of possible decisions or the draft decision;

(c) the public authority responsible for making the decision;

(d) the envisaged procedure, including, as and when this information can be provided:

(i) the commencement of the procedure;

(ii) the opportunities for the public to participate;

(iii) the time and venue of any envisaged public hearing;

(iv) an indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) an indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) an indication of what environmental information relevant to the proposed activity is available; and

(e) the fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

- The public participation procedures shall include **reasonable time-frames** for the different phases, allowing **sufficient time for informing the public** and for the public to **prepare and participate effectively** during the environmental decision-making
- Shall provide for **early public participation, when all options are open** and **effective public participation can take place.**
- Prospective applicants should be encouraged to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

- The public concerned should have access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with Article 4

- **Public Concerned:**

"the public affected or likely to be affected by, or having an interest in, the environmental decision-making; (...) non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest"

- The relevant information shall include at least

(a) a description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

(b) a description of the significant effects of the proposed activity on the environment;

(c) a description of the measures envisaged to prevent and/or reduce the effects, including emissions;

(d) a non-technical summary of the above;

(e) an outline of the main alternatives studied by the applicant; and

(f) in accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed

- Procedures for public participation shall allow the public to submit, in **writing** or, as appropriate, at a **public hearing** or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.
- In the decision **due account** is taken of the outcome of the public participation.

- When the decision has been taken by the public authority, the public is **promptly informed** of the decision in accordance with the appropriate procedures. The text of the decision is accessible to the public along with the reasons and considerations on which the decision is based.
- When a public authority **reconsiders or updates the operating conditions** for an activity the same provisions are applied *mutatis mutandis*, and where appropriate.

"Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment."

- **Art. 7 Public participation concerning plans, programmes and policies relating to the environment**
 - Provide for appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public
- **Art. 8 Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments**

● Access to Justice

● Access to Information - Art. 9 (1)

.... that **any person** who considers that his or her **request for information** under Article 4 has been **ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article**, has access to a **review procedure** before a **court of law** or **another independent and impartial body established by law**

.... (in case of) review by a court of law ... such a person also has access to **an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law**

Final decisions under shall be **binding** on the public authority holding the information. **Reasons shall be stated in writing**, at least where access to information is refused

o Public Participation - Art. 9 (2)

Each Party **shall**, within the framework of its national legislation, ensure that **members of the public concerned**:

- (a) **having a sufficient interest** or, alternatively,
- (b) **maintaining impairment of a right**, where the administrative procedural law of a Party requires this as a precondition, **have access to a review procedure before a court of law and/or another independent and impartial body established by law**, to challenge the **substantive and procedural legality of any decision, act or omission** subject to

the provisions of Article 6 and, where so provided for under national law (...) of other relevant provisions of this Convention

What constitutes a **sufficient interest** and **impairment of a right shall** be determined in accordance with the requirements of national law **and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention**

To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5), shall be deemed sufficient Such organisations shall also be deemed to have rights capable of being impaired ...

- The provisions shall **not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law**

- **Public concerned (Art. 2 (5)):**

"the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest"

- **Acts and omissions that contravene environmental law- Art. 9 (3)**

In addition each Party shall ensure that, **where they meet the criteria, if any, laid down in its national law, members of the public** have access to administrative or judicial procedures to **challenge acts and omissions by private persons and public authorities** which **contravene provisions of its national law relating to the environment**

- **Effective Remedies - Art. 9 (4)**

.... the procedures shall provide **adequate and effective remedies**, including **injunctive relief** as appropriate, and be **fair, equitable, timely and not prohibitively expensive**. Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be **publicly accessible**

o Information and assistance – Art. 9 (5)

In order to further the effectiveness of the provisions of this article, each Party shall ensure that **information is provided to the public** on access to administrative and judicial review procedures and shall consider the establishment of **appropriate assistance mechanisms** to **remove or reduce financial and other barriers** to access to justice

Art. (3) – General obligations

“8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention **shall not be penalised, persecuted or harassed in any way for their involvement**. This provision shall not affect the powers of national courts to award **reasonable costs** in judicial proceedings.

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters **without discrimination as to citizenship, nationality or domicile** and, in the case of a legal person, without discrimination **as to where it has its registered seat or an effective centre of its activities.**”